



AF/3632
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

IN THE MATTER OF:

REISSUE OF: U.S. PATENT NO. 5,996,948

NAME OF PATENTEE: ROBERT SKVORECZ

ISSUED: DECEMBER 7, 1999

TITLE OF INVENTION: WIRE CHAFING STAND

RESPONSE

Commissioner for Patents
P.O. Box 1450
Arlington, VA 22313-1450

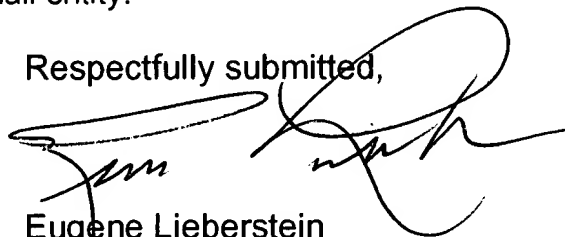
SIR:

This is in response to the notification of non-compliant appeal brief dated August 30, 2005. Applicant respectfully requests a one month extension for responding to the notification until October 30, 2005 with the fee therefor to be deducted from our deposit account number 01-1944.

The attached brief filed in triplicate is compliant with 37 CFR 41.37. The brief includes a "Claims Appendix" and a "Related Proceedings Appendix".

Applicant has also attached a copy of the notification of non-compliant appeal with the transmittal of the appeal for a small entity.

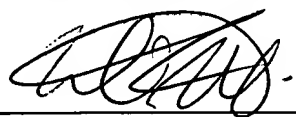
Respectfully submitted,



Eugene Lieberstein
Reg. No. 24645

MAILING CERTIFICATE

I hereby certify that this correspondence is being deposited with the U.S. Postal Service as first class mail in an envelope addressed: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, MAIL STOP APPEAL BRIEF – PATENTS, on October 24, 2005.



Date: Oct. 24 2005

**Notification of Non-Compliant Appeal Brief
(37 CFR 41.37)**

Application No.

09/772,278

Applicant(s)

SKVORECZ, ROBERT

Examiner

Tan Le

Art Unit

3632

The MAILING DATE of this communication appears on the cover sheet with the correspondence address--

The Appeal Brief filed on July 21, 2005 is defective for failure to comply with one or more provisions of 37 CFR 41.37.

To avoid dismissal of the appeal, applicant must file a complete new brief in compliance with 37 CFR 41.37 within **ONE MONTH or THIRTY DAYS** from the mailing date of this Notification, whichever is longer. **EXTENSIONS OF THIS TIME PERIOD MAY BE GRANTED UNDER 37 CFR 1.136.**

1. ☒ The brief does not contain the items required under 37 CFR 41.37(c), or the items are not under the proper heading or in the proper order.
2. ☒ The brief does not contain a statement of the status of all claims, (e.g., rejected, allowed or confirmed, withdrawn, objected to, canceled), or does not identify the appealed claims (37 CFR 41.37(c)(1)(iii)).
3. ☐ At least one amendment has been filed subsequent to the final rejection, and the brief does not contain a statement of the status of each such amendment (37 CFR 41.37(c)(1)(iv)).
4. ☒ (a) The brief does not contain a concise explanation of the subject matter defined in each of the independent claims involved in the appeal, referring to the specification by page and line number and to the drawings, if any, by reference characters; and/or (b) the brief fails to: (1) identify, for each independent claim involved in the appeal and for each dependent claim argued separately, every means plus function and step plus function under 35 U.S.C. 112, sixth paragraph, and/or (2) set forth the structure, material, or acts described in the specification as corresponding to each claimed function with reference to the specification by page and line number, and to the drawings, if any, by reference characters (37 CFR 41.37(c)(1)(v)).
5. ☒ The brief does not contain a concise statement of each ground of rejection presented for review (37 CFR 41.37(c)(1)(vi)).
6. ☒ The brief does not present an argument under a separate heading for each ground of rejection on appeal (37 CFR 41.37(c)(1)(vii)).
7. ☐ The brief does not contain a correct copy of the appealed claims as an appendix thereto (37 CFR 41.37(c)(1)(viii)).
8. ☐ The brief does not contain copies of the evidence submitted under 37 CFR 1.130, 1.131, or 1.132 or of any other evidence entered by the examiner and relied upon by appellant in the appeal, along with a statement setting forth where in the record that evidence was entered by the examiner, as an appendix thereto (37 CFR 41.37(c)(1)(ix)).
9. ☐ The brief does not contain copies of the decisions rendered by a court or the Board in the proceeding identified in the Related Appeals and Interferences section of the brief as an appendix thereto (37 CFR 41.37(c)(1)(x)).
10. ☒ Other (including any explanation in support of the above items):

See Continuation Sheet.

ANITA KING
PRIMARY EXAMINER

Continuation of 10. Other (including any explanation in support of the above items): 1) Appellant's items are not under proper headings. For example: (a) the heading "summary of invention" must be changed to "Summary of claimed subject matter"; (b) the headings "Statement of Issues" and "Grouping of claims" must be replaced by "Grounds of rejection to be reviewed on appeal" and (c) The Brief must contain the following items "Evidence appendix" (Copies of any evidence entered and relied upon in the appeal) and "Related proceedings appendix" (Copies of decisions rendered by a court or the Board in any proceeding identified in the related appeals and interferences section. If none, indicate None).

2) Appellant's status of claims has provided no identification of the appealed claims.

3) Appellant's summary of claimed subject matter has no concise explanation of the subject matter defined in each of the independent claims involved in the appeal and has not referred to the specification by page and specific line number.

4) Appellant's argument has provided no separate heading for each ground of rejection.

5) Appellant's appendix must be presented under "claims appendix".

The above are a few typical errors that examiner is attempted to point out to be correct before the Board of Patent Appeal. Applicant is respectfully urged to fully comply with the new rules of practice before the board of Patent Appeals and Interferences effective September 13, 2004 in 1286 OG 21 and 69 Fed. Reg. 49959 (August 12, 2004).

The petition filed (May 9, 2005) with Director of Group 3600 has been denied.



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF APPEALS

In re Application of

Robert Skvorecz :

Reissue of US Patent 5,996,948

EXAMINER: Tan Le

SERIAL NO: 09/772,278 :

: GROUP: 3632 :

FILED: March 15, 2001 :

FOR: WIRE CHAFING STAND :

:

BRIEF FOR APPELLANT

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

MAIL STOP APPEAL BRIEF - PATENTS

SIR:

All necessary fees in connection with this Appeal Brief including the extension fee should be deducted from Deposit Account No. **01-1944**.

(1) Real Party In Interest:

Robert Skvorecz, as appellant, is currently the real party in interest.

(2) Related Appeals and Interferences:

There is no related appeal or interference proceeding.

(3) Status of Claims:

Claims 1-7 are pending in the application. Claims 1-5 and 7 are under appeal and claim 6 stands allowed and is not, as such, involved in the appeal. Claims 1, 2 and 5 were finally rejected under 35 USC102(b) and claims 1-5 and 7 were finally rejected under 35 USC 251. All of the pending claims 1-7 are set forth in the "Claims Appendix" attached hereto and made a part hereof.

(4) Status of Amendments Filed Subsequent to Final Rejection:

No amendments to the claims were filed subsequent to the final rejection.

(5) Summary Of Claimed Subject Matter

(a) Background Discussion

The subject matter of the invention relates to a wire chafing stand which is a mechanical structure for supporting pre-cooked food at a location which may be remote relative to where the food is being cooked. The remote location is typically an outdoor location where an event such as a party or barbeque is to be held. The wire chafing stand supports a warming pan, preferably of aluminum, into which the pre-cooked food is placed. A burner, referred to as a chafing fuel heater, may be placed under the pan to keep the food warm.

To minimize the cost of transporting wire chafing stands it is desirable to package a multiple number of wire chafing stands in one container with all of the stands nested into one another. The multiple stands are then separated by the local distributor

or the retail establishment upon delivery of the container. Unfortunately, nesting of conventional wire chafing stands inevitably results in wedging of the stands into one another making it difficult, if at all possible, to separate the stands without causing damage.

US Patent No. 5,996,948, issued on December 7, 1999, with claims directed to a solution to the problem of nesting multiple wire chafing stands to minimize the risk of wedging and to facilitate their separation.

(b) Concise Explanation of Subject Matter of Independent Claim 1

The wire chafing stand of the subject reissue application as defined in claim 1 (as amended) includes a first rim (12) of wire steel (see Fig. 1) which forms a closed geometrical configuration circumscribing a first surface area and at least two wire legs (16) with each of the wire legs (16) having two upright sections (19) in a configuration forming a base support (20) for the stand (10) to rest upon (see Fig. 1 and Col. 3, lines 60-64). Each upright section (19) extends upwardly from the base (20) to form an angle equal to or greater than 90° with respect to a horizontal plane through the base (20) and is affixed to the first rim (12) adjacent one end thereof (see Figs. 1 and 4 and Col. 3, line 60 through Col. 4, line 3). The wire chafing stand (10) further comprises a plurality of offsets (30, 40-42) (see figs. 2-5 and figs. 10-13) located either in the upright sections (19) of the wire legs (16) (as in the arrangement of Figs. 2-5 and 10-11) or in the first rim (12) (as in the arrangement of Figs. 12-13) for laterally displacing each wire leg (16) relative to the first rim (12) to facilitate nesting of a multiplicity of stands

(10) into one another without significant wedging (see Col. 4, lines 7-25 and Col. 5, last paragraph).

The reissue specification on Col. 4, lines 7-24 and in the issued patent states that “to readily facilitate nesting between wire stands 10, each side (upright section) 19 of each wire leg (16) includes at least one offset (30)”. Claim 1 specifies the need for a plurality of offsets (30, 40-42). The reissue specification on Col. 5, last sentence, as well as in the issued patent, refers to offsets (42) as shown in Figs. 12-13 located in the upper rim (12) as an alternative to the offsets (30) in the wire legs (16). The word “offset” is defined in the reissue specification in column 2 lines 7-12 and in the issued patent as being an indent for causing lateral displacement of each wire leg (16) relative to the point of attachment of each wire leg (16) with the upper rim (12) so that the wire legs (16) of one chafing stand (10) can nest within another chafing stand (10) without wedging. The function of the “offset” is further explained in the reissue specification on Col. 4, lines 7-35 and again in Col. 5, last paragraph of the specification before the claims.

(c) Concise Explanation of Subject Matter of Dependent claims 2 and 5

Claim 2 specifies that the plurality of offsets (30) are in the upright section (19) and divide each upright section (19) into two segments (See Fig. 1 and 4) lying in different planes relative to one another.

Claim 5 specifies that the plurality of offsets (40, 41) are welded to the wire legs (16) at the separation of the upright section 19 into segments. (See Figs. 10 and 11 and Col. 5, lines 10-12).

(6) Discovery Of Error In US Patent No. 5,996,948

After issuance of US Patent No. 5,996,948 the applicant, in a discussion with the attorney of record relating to the scope of the issued claims, informed the attorney of record that although the wire chafing stand (10) preferably includes a second or lower rim (14), the lower rim (14) is not a mandatory component of the wire chafing stand and has nothing to do with the problem of wedging of the stands (10) into one another or to its solution. Since the patent specification does not describe the lower rim (14) as an essential component of the wire chafing stand (10) and since the lower rim (14) has no relationship to the subject of wedging and was not involved in the prosecution of the claims it became apparent that the recitation of a lower rim (14) in claim 1 was unnecessary and unduly restricting and that its presence constituted an error. Based upon the existence of an error in the claims of the issued patent No. 5,996,948 which did not surface until after the issuance of the patent but before the expiration of two years from the date of issuance a reissue application was filed under 37 CFR 1.63 to remove the recitation of the lower rim (14) from claim 1 and to include this limitation in a new claim 7 dependent upon claim 1. The declaration in the subject reissue application claims that the original patent was wholly or partially inoperative by reason of applicant claiming less than applicant had a right to claim and requests rectification thereof.

(7) Prosecution Of Reissue Application

The reissue application was finally rejected on December 16, 2002 and a Notice of Appeal was filed on March 13, 2003 followed by the filing of an Appeal Brief

dated May 13, 2003. Thereafter, at the election of the Examiner, the finality of the final rejection, upon which the appeal was based, was withdrawn and the prosecution reopened. A third office action dated May 4, 2004 was issued including a rejection of the claims 1, 2 and 5 under 325USC102(b) as being fully anticipated by US Patent 5,503,062 (Buff IV), which was not of record during the appeal and constituted a new ground of rejection raised for the very first time. Applicant responded without making any amendment to the claims and the Examiner issued a new final rejection dated December 30, 2004 upon which this appeal is now based.

In response to the final rejection applicant submitted a Declaration executed by the Patentee Under 37CFR 1.132 to support applicants arguments. The Declaration of applicant was not made of record based upon the allegation that the submission of the Declaration was untimely in that it was filed with the response to the final rejection. Applicant filed a Petition dated May 9, 2005 directed to the Director of Group 3600 to enter the Declaration Under 37 CFR 1.132, in support of applicants arguments. This petition was denied affirming the refusal by the Examiner to enter the Declaration as being untimely filed.

(8) Grounds of Rejection to be Reviewed on Appeal

1. Claims 1, 2 and 5 stand finally rejected under 35 USC 102(b) "as being fully anticipated by US Patent 5,503,062 (Buff IV)".

Claims 2 and 5 have been separately argued and should not be grouped together with the rejection of claim 1 under 35 USC 102(b).

2. Claims 1- 5 and 7 stand finally rejected under 35 USC 251 “as being an improper recapture of broadened claimed subject matter surrendered in the application for the patent upon which the present reissue is based”.

The claims 1-5 and 7 may be grouped together for consideration pursuant to the rejection under 35 USC 251.

3. Claim 6 is an independent claim which is identical to claim 6 in the issued patent and has again been re-allowed. Accordingly, claim 6 is not involved in this appeal.

(9) Argument

(a) Rejection of claim 1 under 35 USC 102(b)

As set forth in the MPEP 2131 “a claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently, described in the single prior art reference”. Claim 1 includes as an element “a plurality of offsets (30, 40-42) located either in the upright sections (19) of the wire legs (16) or in said first rim (12) for laterally displacing **each** (emphasis added) wire leg (16) relative to said first rim (12) to facilitate the nesting of a multiplicity of stands (10) into one another without significant wedging”. The cited reference Buff ‘062 does not disclose a plurality of “offsets” as defined in claim 1. The term “offset” is a term which is defined in the subject patent in column 2 lines 7-8 as an indent in each wire leg at a specific location to cause a lateral displacement of each wire leg 16 relative to the point of attachment of each wire leg 16 with respect to the (first) upper rim 12. As a result of this displacement of

each of the wire legs it is possible to nest a multiple number of wire chafing stands 10 into one another without wedging. The term "offset" is defined explicitly in claim 1 and in the description in term of the functional requirement of causing a lateral displacement of each wire leg relative to the upper (first) rim. In contradistinction, idem "52" in Buff, which the Examiner alleges constitutes an "offset", are only present at the opposite longitudinal ends (in the handles 38) of the outer support frame 20 (see Figure 2 in Buff) and therefore cannot possibly function to cause a lateral displacement of each wire leg relative to the point of attachment of each wire leg and the upper rim as required in the claim 1. In fact, the omission of alleged offsets "52" from the lateral sides in Buff '062 makes it impossible to cause a lateral displacement of each of the wire legs (50 in Buff) relative to the point of attachment of "each wire leg to the upper rim" as is required in claim 1. Applicant presented a Declaration under 37CFR 1.132 to substantiate the impossibility of the shoulders 52 in Buff '062, which the Examiner alleges to represent offsets, to perform the function of "offsets" as defined in claim 1. Although the Declaration of applicant is not of record applicant considers the technical impossibility of the offsets 52 to laterally displace the wire legs 50 particularly on the lateral sides of the support wire 40 to be so self evident that the Board of Appeals is requested to take judicial notice of this. However, even if judicial notice is not taken the use of alleged offsets "52" in Buff '062 are clearly limited to the handles 38 at the opposite longitudinal ends of the outer support frame 20 and as such do not satisfy the requirement of MPEP 2131 to justify a rejection based solely upon anticipation under 35USC102.

The alleged offsets "52" in Buff '062 are explained by Buff on column 5 lines 27-29 as being provided only in the region of the outer support frame 20 where the

handles 38 are coupled to the support members 50. Note that the handles 38 are only located at the opposite longitudinal ends of the outer support frame 20. In fact, the members 52 are obviously formed, as shown in Figure 2 of Buff '062, by simply bending the upstanding handles 38 over (emphasis added) the support wire 40 to receive the support rim 44 of the roasting pan 16. Since the offsets 52 in Buff '062 are disposed or formed over the support wire 40, they cannot be "located either in the upright sections (19) of the wire legs (16) or in said first rim (12)" but can only be located at the coupling between the handles 38 and support members 50 as Buff'062 teaches. Thus the members 52 cannot be located in the specified alternative locations called for in reissue claim 1. Accordingly this is another reason why the rejection of claim 1 is improper and fails to satisfy the requirement of MPEP 2131 under 35 USC 102(b).

It is further pointed out that Buff '062 specifically teaches, in column 5 lines 31-34, that "the shoulders 52, nestably receive the outwardly extending support rim 44 of the roasting pan 16". Contrary to the allegation of the Examiner this is an entirely different function and objective from the function and objective of the "offsets" defined in the subject reissue application and claimed in claim 1. Moreover, column 5 lines 13-16 in Buff '062, which has been specifically referred to for support by the Examiner, discusses the word "nesting" only in the context of the arrangement of support members to facilitate nesting of a disposable aluminum foil roasting pan 16 into the reinforcing assembly 20 which is entirely different from the interpretation of the Examiner.

In addition, the reinforcing pan assembly 10 in Buff '062 requires an internal support rack 12 see column 5 lines 35 – 45 which the Examiner ignores in

making the assumption that a “stand” as called for in reissue claim 1 can represent only the support structure 20 formed of two parts 40 and 49. There is no teaching in Buff ‘062 for using the support structure 20 as a wire chafing stand independent of the other components of the reinforcing pan assembly 10 such as the internal support rack 12 nor any suggestion of the need or desire to nest a plurality of support structures 20 by themselves into one another. In this regard, the teaching in column 5, lines 31-34, of Buff ‘062 has nothing to do with the problem of nesting of one chafing stand into another and the suggestion of the Examiner has no basis in Buff ‘062. This is an additional reason why the rejection of claim 1 is improper and fails to satisfy the requirement of MPEP 2131 under 35 USC 102(b).

Notwithstanding all of the above distinctions claim 1 also requires “at least two wire legs (16) with each wire leg (16) having two upright sections (19) interconnected to one another in a configuration forming a base support (20) for the stand to rest upon”. This is not taught in Buff ‘062 in that each wire leg 50 in Buff ‘062 (Figure 2) does not itself have two separate upright sections much less with the upright sections interconnected to form a base support for the stand to rest upon. Buff ‘062 uses the wire legs 50 in combination with an upper support wire 40 to form a base support which is an entirely different arrangement from that claimed in claim 1 for the upright sections (19) as shown in Figure 1 for forming the base support (20). This is yet a further reason why the rejection of claim 1 is improper and fails to satisfy the requirement of MPEP 2131 under 35 USC 102(b).

Accordingly, Buff ‘062 does not anticipate reissue claim 1 and the final rejection of claim 1 under 35 USC 102(b) should clearly be overruled.

As regards claim 2, the Examiner alleges that the members 52 in Buff '062 can be interpreted to read on the wording of claim 2 which requires the offsets in said upright sections to divide each upright section into two segments. The members 52 in Buff '062 are explained by Buff on column 5 lines 27-29 as being provided only in the region of the outer support frame 20 where the handles 38 are coupled to the support members 50 and are used solely to support the roasting pan 16. There is no teaching in Buff '062 in the description or figures to justify the interpretation of the Examiner that each upright section is divided into two segments. Accordingly, this allegation is inconsistent with the teaching of Buff and is without merit. Moreover, claim 2 is a dependent claim and is otherwise allowable for the same reasons as given above in connection with claim 1.

Similarly claim 5 also refers to the separation of the upright sections into segments which has no correlation to the device taught in Buff '062 regardless of how broadly one interprets the assembly 10 in Buff '062. For this reason claim 5 is clearly patentable over Buff . Moreover, claim 5 is otherwise allowable since it is a dependent claim.

(b) Recapture

The Examiner has finally rejected claims 1-5 and 7 under 35 USC 251 based upon the "recapture rule" relying on pages 1-2 of the Memorandum of the Patent Office dated August 4, 2003. The Examiner states that the "recapture rule" requires the analysis of a three step process. This is also set forth in the MPEP 1412.02. In the first step the Examiner has identified the words in claim 1 which were deleted from claim 1 in

the issued patent. Claim 1 of the subject reissue application (hereafter "reissue claim 1") is shown attached hereto as amended.

The second test step as pointed out by the Examiner requires determining whether the broader aspects of the reissue claims relate to surrendered subject matter. The Examiner proceeds to make the statement in paragraph 2 of Page 4 that "Changes to claim 1 were made by Applicant in an effort to make claim 1 narrower and to overcome the prior art rejection in order to make the claim allowable". The statement is only partially true and is otherwise false. The Examiner is referring to an amendment filed during the patent prosecution by applicant dated July 26, 1999 in which claim 1 was amended. A copy of the exact submission of claim 1 as amended on July 26, 1999 is as follows:

1. (As amended) A wire chafing stand comprising an upper rim of wire steel which forms a closed geometrical configuration circumscribing a first surface area, a lower rim of wire steel forming a closed geometric configuration circumscribing a second surface area with said surface area being larger than said second surface and having a plurality of wire legs [pair of wire legs of equal length affixed at one end thereof to the upper rim and affixed to the lower rim at an equal location substantially approximate the opposite end of each wire leg such that the upper rim and lower rim lie in substantial parallel alignment to one another with the wire legs extending equal distances below the rim to uniformly support the stand at opposing ends thereof and having a plurality of offsets in the upper rim of said stand or in the wire legs at the point of interconnection therebetween.] with each wire leg having two upright sections interconnected to one another at a location below the lower rim in a configuration forming a base support for the stand to rest upon with each upright section extending upwardly from said base support to form an angle equal to or greater than 90° with respect to a horizontal plane through said base support and being affixed to the

upper rim adjacent one end thereof and to said lower rim at a relatively equal distance below the point of attachment to said upper rim and further comprising a plurality of offsets located either in said upright sections of said wire legs or in said upper rim for laterally displacing each wire leg relative to said upper rim to facilitate the nesting of a multiplicity of stands into one another without significant wedging.

It is self evident from the amended language of the above claim 1 that going from a “pair of wire legs of equal length . . . at an equal location . . . such that the upper rim and lower rim lie in substantial parallel alignment to one another etc. . . .” to the language “a plurality of wire legs” and without the requirement “of equal length” and not being limited to “at an equal location” in the relationship to the wire legs or to the requirement that “such that the upper rim and lower rim lie in substantial parallel alignment” constitutes a substantial broadening of the claim relative to the upper and lower rim elements and their relationship to the wire legs and does not constitute a narrowing of the claim with regard to this aspect of the claim. Claim 1 was however also narrowed in several respects. The wire leg elements (16) in claim 1 were amended to include two upright sections (19) which form a base support (20) for the stand (10) to rest upon. More significantly claim 1 was amended identify an angular relationship of the upright sections to a horizontal plane through the base support and to further limit the offset elements. These amendments are identified by the following underlined language: “with each upright section extending upwardly from said base support to form an angle equal to or greater than 90° with respect to a horizontal plane through said base support and being affixed to the upper rim adjacent one end thereof and further comprising a plurality of offsets located either in said upright sections of said wire legs or in said upper rim for laterally displacing each wire leg relative to said upper rim to

facilitate the nesting of a multiplicity of stands into one another without significant wedging". This underlined language has not been changed in reissue claim 1, other than to change "upper" to read --first—and it was this language which overcame the prior art rejection in order to make the claim allowable.

The lower rim element was broadened to some extent by the amendment during prosecution and was clearly neither narrowed or eliminated. Accordingly, this element played no part in distinguishing the invention over the prior art. The amended claim 1 recites a relationship between the wire legs and the lower rim which is equal to or broader than the relationship defined in the original version of claim 1 by use of the following underlined language: "each wire leg having two upright sections interconnected to one another at a location below the lower rim in a configuration forming a base support for the stand to rest upon". Stated otherwise, claim 1 was amended was during prosecution from its original version but the defined relationship as regards the lower rim element was either clearly broadened or unaffected by the amended language. More importantly, the lower rim element did not play any part in the allowance of claim 1. Accordingly, there was never any surrender of subject matter relating to the lower rim aspect of the invention during the prosecution of the original application.

The Examiner makes reference to a statement made by applicant in the above noted amendment that "Applicant has amended claims 1 and 5 to clearly distinguish the subject invention from the disclosure in Andrews US Patent No. 1,688,846". This statement is indeed true in that Andrews does not teach forming a base support for the stand to rest upon with each upright section extending upwardly

from said base support to form an angle equal to or greater than 90° with respect to a horizontal plane through said base support and does not teach a plurality of offsets located either in said upright sections of said wire legs or in said upper rim for laterally displacing each wire leg relative to said upper rim to facilitate the nesting of a multiplicity of stands into one another without significant wedging. All of this was pointed out to the Examiner and none of the above wording of the amended claim was changed or further amended in the filing of the reissue application.

As stated earlier, claim 1 was amended during prosecution from its original version but the defined relationship relative to the lower rim was clearly either broadened or unaffected by the amended language and did not play any part in the allowance of claim 1. In fact the Examiner, from the outset of the prosecution, and in the very first Office Action rejected the claims stating that an upper and lower rim in a chafing stand with each having a closed geometrical (rectangular) configuration as claimed are known features. Applicant never argued otherwise. Moreover, at no time during the prosecution did applicant argue that the lower rim was a feature for distinguishing the invention over the prior art or that the lower rim overcame the problem of wedging and/or facilitated nesting which was the basis for allowance of the application. More specifically, the presence or absence of the lower rim never played a role during the prosecution in the allowance of claim 1.

Without any further showing the Examiner, in the last paragraph of page 5 of the final rejection, concludes that "The record of the original application shows that the broadening aspect in reissue claim 1 relates to subject matter that applicant

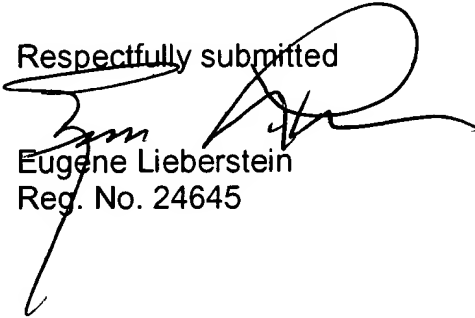
previously surrendered during the prosecution of the application....". In fact, the record clearly supports the opposite.

The Examiner's allegation that the record shows that "the broadening aspect of the reissue claim 1" relates to subject matter that Applicant previously surrendered represents an unsupported conclusion of the Examiner contrary to the record. The reissue application was filed under 37 CFR 1.63 giving applicant the right to broaden claim 1. The amendment filed during the prosecution of the patent, as explained above, in one aspect broadened the originally filed claim language in relation to the upper and lower rims, the number of wire legs, eliminated the parallel alignment and equal length requirements and in another aspect, which is unrelated to the element of the lower rim, narrowed the claim to overcome the prior art. The narrow language relates to the need and relationship of the "offsets" to the wire legs and first (upper) rim and their location to facilitate "nesting" by laterally displacing each wire leg relative to the upper rim. It is this limitation in claim 1 which clearly distinguishes the invention from the prior art. The Examiner does not disagree with this in that the application was allowed based upon this distinctive feature. Accordingly, contrary to the assertion of the Examiner, the facts in this case are the exact opposite from the facts in *Pannue v Storz Instruments* 59 USPQ 2d 1597 (cited by the Examiner) in that the removal of the lower rim element from claim 1 does not relate to subject matter previously surrendered and as such there is no recapture. Accordingly, the rejection of claims 1-5 and 7 under 35 USC 251 based upon the recapture rule should be reversed.

(9) **Conclusion**

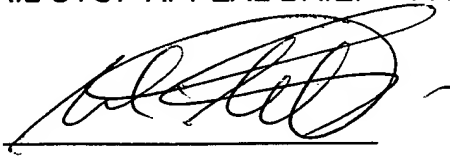
The Examiner has clearly failed to substantiate invalidity of the reissue claims either under 35USC 102(b) or under the recapture rule in 35 USC 251. Accordingly, Applicant respectfully solicits the Board of Patent Appeals to reverse the final rejection of claims 1-7.

Respectfully submitted


Eugene Lieberstein
Reg. No. 24645

MAILING CERTIFICATE

I hereby certify that this correspondence is being deposited with the U.S. Postal Service as first class mail in an envelope addressed: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, MAIL STOP APPEAL BRIEF – PATENTS, on October 24, 2005.


Date: Oct 24 2005

Claims: APPENDIX

1. (Amended) A wire chafing stand comprising a first [an upper] rim of wire steel which forms a closed geometrical configuration circumscribing a first surface area, [a lower rim of wire steel forming a closed geometrical configuration circumscribing a second surface area with said first surface area being larger than said second surface area] and having at least two [a plurality of] wire legs with each wire leg having two upright sections interconnected to one another [at a location below the lower rim] in a configuration forming a base support for the stand to rest upon with each upright section extending upwardly from said base support to form an angle equal to or greater than 90° with respect to a horizontal plane through said base support and being affixed to the first [upper] rim adjacent one end thereof [and to said lower rim at a relatively equal distance below the point of attachment to said upper rim] and further comprising a plurality of offsets located either in said upright sections of said wire legs or in said first [upper] rim for laterally displacing each wire leg relative to said first [upper] rim to facilitate the nesting of a multiplicity of stands into one another without significant wedging.

2. A wire chafing stand as defined in claim 1 wherein said plurality of offsets are in said upright sections and divide each upright section into two segments lying in different planes relative to one another.

3. (Amended) A wire chafing stand as defined in claim 7 [2] wherein said first and second rim [upper and lower rims] form a geometry selected from the class consisting of square, oval and rectangular configurations.

4. A wire chafing stand as defined in claim 3 wherein said wire legs support said stand from opposite sides thereof with each wire leg having a unitary construction and having two generally “U” shaped sections extending between an intermediate section defining a handle for the stand.

5. A wire chafing stand as defined in claim 1 wherein said plurality of offsets are welded to said wire legs at the separation of the upright sections into segments.

6. A wire chafing stand comprising an upper rim of wire steel which forms a closed geometrical configuration circumscribing a first surface area, a lower rim of wire steel forming a closed geometrical configuration circumscribing a second surface area with said first surface area being larger than said second surface area and having two wire legs for supporting said stand at opposite ends thereof with each wire leg being of unitary construction having two upright sections of substantially equal length with the upright sections being interconnected to one another in a generally "U" shaped configuration below said lower rim to form a base support for the stand to rest upon and being interconnected to one another adjacent the upper rim for defining a handle for the wire chafing stand and being welded at predetermined locations to the upper and lower rims such that the upper and lower rims lie in substantial parallel alignment to one another and with each upright section extending upwardly from the base support to form an angle equal to or greater than 90° with respect to a horizontal plane through said base support and further comprising a plurality of offsets located in said upright sections of said wire legs which separate the upright sections into segments lying in different planes relative to one another for laterally displacing each wire leg relative to said upper rim so as to facilitate the nesting of a multiplicity of stands into one another without significant wedging.

7. (New) A wire chafing stand as defined in claim 1 further comprising a second rim of wire steel located below said first rim with said second rim circumscribing a second surface area smaller than said first surface area and with said upright sections being affixed to said second rim at a relatively equal distance below their attachment to the first rim.

Evidence Appendix

NONE

Related Proceedings Appendix

NONE